IN THE

Supreme Court of the United States

OCTOBER TERM, 1950.

No. 565

RADIO CORPORATION OF AMERICA, NATIONAL BROADCASTING COMPANY, INC., RCA VICTOR DISTRIBUTING CORPORATION, ET AL.,

Appellants,

vs.

THE UNITED STATES OF AMERICA, FEDERAL COMMUNICATIONS COMMISSION, AND COLUMBIA BROADCASTING SYSTEM, INC.,

Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS.

BRIEF FOR THE APPELLANT, INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, AFL.

ALFRED KAMIN,
201 N. Wells St.,
Chicago 6, Ill.,
Counsel for Appellant, Local 1031, International Brotherhood of Electrical Workers, AFL.

THE BUNTHORP-WARREN PRINTING COMPANY, 210 WEST JACKSON, CHICAGO 86

INDEX.

Subject Index.

TABLE OF CASES CITED:

STATUTES CITED.

PUBLICATIONS.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1950.

No. 565

RADIO CORPORATION OF AMERICA, NATIONAL BROADCASTING COMPANY, INC., RCA VICTOR DISTRIBUTING CORPORATION, ET AL.,

Appellants,

vs.

THE UNITED STATES OF AMERICA, FEDERAL COMMUNICATIONS COMMISSION, AND COLUMBIA BROADCASTING SYSTEM, INC.,

Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS.

BRIEF FOR THE APPELLANT, INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, AFL.

OPINIONS BELOW

The majority and dissenting opinions of the United States District Court for the Northern District of Illinois are reported at ..... F. S. .....

JURISDICTION.

The Jurisdiction of the Supreme Court of the United States to review the decision below by direct appeal is conferred by Title 28, United States Code, Sections 1253 and 2101 (b). On March 5, 1951, probable jurisdiction was noted by this Court and the case assigned for argument on March 26, 1951.

QUESTIONS PRESENTED.

This appellant adopts as its own the statements of questions presented which are set forth in the brief filed herein by the Radio Corporation of America, National Broadcasting Company, Inc. and RCA Victor Distributing Corporation, appellants and in the brief filed herein by Emerson Radio and Phonograph Corporation, appellant.

STATEMENT.

The brief of Radio Corporation of America and its affiliates contains a statement of the case which accurately recites the nature and chronology of the proceedings before the Federal Communications Commission and before the Court below.

The appellant, Local 1031, International Brotherhood of Electrical Workers, AFL, is a voluntary, unincorporated labor organization. Its headquarters are in Chicago, Illinois. The Local Union has a good-standing membership in excess of 21,000. Not less than 18,000 of its members are employed in and around Chicago and Bloomington, Illinois by manufacturers of television receivers or receiver parts and equipment. Virtually all members of the Union own and operate television receivers in their homes.

Under the provisions of the National Labor Relations Act, 29 U. S. C., § 151, *et seq.*, and pursuant to representation elections conducted by the National Labor Relations Board, this appellant acts as statutory collective bargaining representative for the employees above described and in their behalf has negotiated and administers a host of collective labor agreements with their employers.

The average aggregate annual earnings of the members of the Local employed in manufacturing television parts, equipment, and receivers exceed the sum of fifty million dollars. Any disruption of the continuity of their jobs unlawfully or unwarrantedly induced by the Federal Communications Commission order complained of would cause permanent and irreparable damage to the members of the Union thus employed.

The Union asserts the rights of its members in this proceeding not only as manufacturing employees, but as owners and users of television receiver equipment. (R. 548-55.)

Local 1031 took no part in the proceedings of the Federal Communications Commission which are under attack. A full explanation for its non-participation in such proceedings appears clearly in the argument herein. The appellant's direct and substantial interest in the case at bar was recognized by the Court below. Over the objections of the defendants, the Court below granted the Union leave to intervene in the proceedings, to file its complaint and its affidavits in support thereof. (R. 791, 796, 864.)

SUMMARY OF ARGUMENT.

The Federal Communications Commission "Color TV" order flouts the public interest, fosters public inconvenience, and is based upon no public necessity. Such order was, therefore, in excess of the Commission's statutory authority. The Court below recognized these defects in the Commission's order, but erroneously refused to consider the public consequences of the order, on the ground that the overwhelming public distaste for the mandated method of color television broadcasting was demonstrated outside the record made by the Commission. In a case where an agency order directly invades millions of American homes, intrudes upon family budgets, impairs established values of expensive home equipment, and otherwise disrupts the reasonable and normal expectations of the public, ordinary considerations for the "administrative record" should not be sterilely and mechanically applied. Under such circumstances the Court has the statutory right, if not the duty, to evaluate the natural and probable public impact of the impending agency action, even though the agency has blindly refused to consider such consequences. Upon a proper showing, as was here made, the Court should annul the order or at least suspend it pending hearing of such issues by the agency.

In adopting a second standard of black and white broadcasting and in other respects the order complained of was at substantial variance with the Commission's Notice of Proposed Rule-Making of July 11, 1949. It therefore deprived this appellant and others similarly situated of the right and opportunity to be heard in the rule-making procedure and to present vital information and arguments concerning the public interests which would be violated by "incompatible" broadcasting of color and black-and-white TV signals.

ARGUMENT.

I.

The Challenged Order of the Federal Communications Commission Is in Excess of the Agency's Statutory Authority.

Attitudes and approaches of the litigant who challenges action of the Federal Communications Commission have been delineated by this Court. This appellant may be moved to act in these proceedings as the protector of the economic interests of its membership, as employees and set owners, but it has standing in this Court only as a representative of the public interest. *Scripps Howard Radio, Inc.* v. *Federal Communications Commission*, 316 U. S. 4, 14; 62 S. Ct. 875, 882. The Commission was not left "at large" in determining what constitutes public interest, convenience or necessity. *National Broadcasting Company* v. *United States*, 319 U. S. 190, 216; 63 S. Ct. 997, 1009. Opportunity for asserting public interest was expanded by the liberal provisions for the intervention of municipal corporations, associations and other parties interested in a pending controversy, which are incorporated in the statutory scheme for judicial review of FCC action. 47 U. S. C. 402 (a); 28 U. S. C. 2323. If the public interest is the standard for parties who appear before the Commission or the Courts to advocate or challenge proposed Commission action, then a yet higher degree of impartiality and poise must control the Federal Communications Commission when it seeks to use its comprehensive regulatory powers, purportedly to "secure the maximum benefits of radio [and television] to all the people of the United

States." *National Broadcasting Company* v. *United States*, 319 U. S. 190, 217; 63 S. Ct. 997, 1010.

The tragedy in the record now before this Court lies in the failure of the Commission and of the majority of the Court below to evaluate the color television controversy in terms of the ultimate public interest and their unwillingness to view it as something other than a test of strength between the RCA group and the CBS group, the two giants of the broadcasting industry. Every editorial caution of their draftsmen does not prevent the Commission's two reports in support of their orders (R. 95-288, 413-31) from reading like bitter polemics against the RCA-NBC group and hasty rationalizations in favor of the CBS combine. The majority of the Court below fell into this same error of approach when it declared, "The contest is mainly between two great broadcasting systems for a position of advantage in this rapidly developing field of television." ..... F. S. ....., at ..... (R. 878.)

It is precisely because the issues of the case at bar transcend the private rights of any of the parties to this controversy, including the sensitive egos of the majority of the members of the FCC, that this labor organization intervened in the proceedings below and participates in this appeal.

The economic jeopardy, to which its members would be subjected by necessary changes in manufacturing methods, retooling and redesigning of television receivers to receive the CBS signals in black-and-white or color, demonstrates the interest which this appellant was required to show to intervene in the proceedings below. But its apprehensions concerning the continuity of employment and the maintenance of earnings of its members would alone, concededly, be a narrow, if not fatuous, ground for asking this Court to overturn the Commission's order. If a period of

conversion unemployment for the members of the Union were the sole price of enabling the radio and television industry as a whole to achieve an orderly transition to efficient and satisfactory color television broadcasting and reception, the Union's voice would not be heard in litigious protest.

The members of this Union come to the bar of this Court with the insight of workers who know intimately all phases of the television receiver manufacturing industry. They come with the discernment of receiver owners and television viewers of long experience and understanding. In this capacity and in this right they assert that the Federal Communications Commission color order would invoke a public disaster of the first magnitude. It is in this spirit that they declare that the order complained of would promote a needless and unwarranted experiment in television broadcasting and manufacture which is clearly destined to early failure at great public cost.

This court has said "Generalities unrelated to the living problems of radio communication of course cannot justify exercises of power by the Commission. Equally so, generalities empty of all concrete considerations of the actual bearing of regulations promulgated by the Commission to the subject matter entrusted to it, cannot strike down exercise of power by the Commission." *National Broadcasting Company* v. *United States*, 319 U. S., 190, 219; 63 S. Ct. 997, 1011.

We submit that the same regard for "living problems" and "concrete considerations" should be commanded of the Federal Communications Commission in the case at bar.

The cliches of administrative law should not have blocked consideration by the District Court of demonstrable physical and economic facts which expose the fallacious conclu-

sions of the Commission. There exists cogent statutory authority for consideration of such facts even though they were not presented when the administrative record was being made, or had not yet occurred when the record was closed.

The statute regulating proceedings to enforce, suspend, enjoin, annul, or set aside orders of the Federal Communications Commission, allows intervention at any time after the commencement of such District Court proceedings, by "communities, associations, corporations, firms and individuals interested in the controversy or question before the Commission." Title 47, U. S. C. § 402(a); Title 28, U. S. C. § 2323. Participation in the proceedings before the Commission is not a *sine qua non* for intervention in the judicial review action. This legislative scheme for court review of Commission action permits latitude of presentation and argument on the part of an intervener who is first identified with the proceedings after procedures in the District Court have been invoked pursuant to the statute. Accordingly, we submit that the majority of the Court below erred in refusing to consider at all the evidence and contentions offered by this appellant in the trial proceedings because they were "predicated upon matters outside the record made before the Commission." ..... F. S. ....., at ...... (R. 872.) Any other statutory construction would render meaningless and futile, legislatively-sanctioned intervention by "communities, associations, corporations, firms or individuals" in the court proceedings to review Commission action. What would intervention avail them if such parties were held strictly to the confines of an administrative record completed without their participation?

This construction of the statute applies *a fortiori* to the case of the intervener who is first made aware of the dangers of impending agency action only after the agency

hearings have been closed and the order published. See Point II below discussed.

We do not wish this portion of our argument to be misconstrued. We do not assert that the District Court should have tried the matter *de novo* or should otherwise have substituted its judgment for that of FCC. But we do declare that the District Court would have been correct under the statute in yielding to its announced inclination "to vacate the order and send the proceedings back to the Commission for further consideration in view of recent developments in the color television field as well as the rapidly changing economic situation." ..... F. S. ....., at ..... (R. 875.)

Conceding, *arguendo*, that the Commission's record accurately reflects facts as they existed at the time the hearings were closed on May 26, 1950, economic events since the close of the hearings nullify the conclusions now sought to be sustained by the Commission.

There are now estimated to be about twelve million television receivers in the hands of the American public. The District Court accepted as accurate the estimate that nine million receivers were in use just prior to the hearing below. ..... F. S. ....., at ..... (R. 794-5.) Reliable manufacturing sources (See Appendix B, hereof) show that about three million additional receivers were manufactured in the four month period, November 1, 1950 to February 28, 1951.

A description of the nature, character and design of this receiving equipment now being utilized and enjoyed by the people of this nation will demonstrate the fallacies inherent in the FCC order here challenged.

Commercial standards for transmission and reception of monochrome (black and white) television programs were established by the FCC in 1941. Because of war, home tele-

vision receiver production in quantity did not commence until 1946.

Public acceptance of television was by no means rapid. These are the best estimates of the rate of receiver acquisition by the American public:

January 1, 1947	15,000 sets in use
January 1, 1948	200,000 sets in use
January 1, 1949	1,000,000 sets in use
January 1, 1950	4,000,000 sets in use
March 1, 1951	12,000,000 sets in use

(R. 3-4, 608; Appendix B hereof.)

For practical purposes all receivers in the homes of the nation are direct-view receivers.* In such receivers the broadcast picture is viewed on the face of the cathode-ray tube which is built into the set.

Early direct-view receivers were made with viewing tubes of seven inches or smaller. A seven inch tube yielded a picture of approximately 26 square inches. The small pictures available satisfied only the public desire for the novelty of seeing a moving picture in the home. It was necessary to sit so close to the tiny viewing tubes to enjoy a program that the projected lines making up the picture were distracting and annoying. Complaints of eyestrain, particularly among children, were common.

An experiment was tried in magnification of these small pictures by placement of a lens in front of the viewing tube to increase apparent image size. The experiment failed. The Commission has found, "Magnifying lenses have not

* Projection receivers in which the images received by the set are projected through a lens system onto a screen have found little or no public acceptance. The machinery is complicated and cumbersome. For viewing the room must be darkened. Image quality is generally unsatisfactory for home use because of severely restricted viewing angles. Projection receivers have some possibilities in public auditorium or theatrical use. Less than two thousand projection receivers were built in 1950 out of a total receiver production of seven and one-half million. (See Appendix B hereof.)

been popular in black-and-white receivers since they severely restrict the viewing angle and are susceptible to annoying specular reflections from lights in the room." (R. 150.)

Mass television acceptance, it soon became clear to the industry, could be successfully achieved only by giving the public larger pictures for convenient group viewing—in attractive, compact receivers. Seven inch set production yielded to ten inch sets which gave pictures of approximately 61 square inches. Ten inch sets gave way to twelve and one-half inch sets producing pictures of about 97 square inches. And still the pictures were too small in the opinion of potential home users.

The most dramatic turn was made in the year of 1950, while the FCC hearings were being conducted. The television manufacturing industry developed an attractive line of 16 inch and larger tube receivers, in pleasing design at reasonable prices. 16 inch tubes produce pictures of about 145 to 165 square inches and 19 inch tubes yield a picture of approximately 203 to 238 square inches. Tuning and control mechanisms were simplified. Group viewing of television programs was no longer a dream. It was a fact. The householders of the nation responded promptly. From January 1, 1950 to March 1, 1951 nearly nine million television receivers were manufactured and sold for home use. Six million of these sets were of tube size 16 inches or larger.

In January of 1951 more than 95% of the sets being manufactured were of 16 inch or larger tube size. Television has come of age. (Affidavit of Richard L. Hirsch, R. 777-789; Appendix B hereof.)

This is the miracle which FCC now seeks to undo. It is like trying to unscramble an egg and restore it to the shell. For in the framework of these economic realities

what is the real meaning and effect of the Commission's order here challenged?

The Commission virtually admits that sets with viewing tubes larger than 12½ inches cannot be successfully converted to receive the CBS signals in color.* While in its first report (R. 148-50), the Commission spoke hopefully of a reduction of the picture in a 16-inch or larger tube to 12½ inches, there is nothing in the record showing the existence or invention of any device whereby the set owner himself could effectuate such reduction in picture size automatically when CBS color signals were being broadcast and return the tube to full size for standard broadcasts.

The Commission also found that since the rotating disc or Columbia wheel must be placed in front of the viewing tube, "some existing receivers with doors or recessed tubes would, in practice, be difficult** to convert." (R. 148.) In 1950 nearly 300,000 receivers with tubes smaller than 16 inches were manufactured in models combining radio or phonograph or both. All of these sets have doors. How many receivers have recessed tubes cannot be estimated. But admittedly nearly 300,000 combination instruments with tubes less than 16 inches which were manufactured in 1950 cannot be converted for CBS color. (See Appendix B hereof.)

In its final report the Commission apparently abandoned the notion that existing direct-view receivers with tubes larger than 12½ inches could be converted for receipt of

---

* With no equivocation the Condon Committee found that only "existing receivers with picture tubes of 12½ inches and smaller diameter can be converted to color reception, but at an appreciable cost."—"THE PRESENT STATUS OF COLOR TELEVISION."—Report of the Advisory Committee on Color Television to the Committee on Interstate and Foreign Commerce, United States Senate, July 14, 1950, 81st Cong., 2nd Sess., Document No. 197, p. 30.

** Agency euphemism for "impossible."

CBS color signals or that manufacture of new color receivers in sizes larger than 12½ inches was feasible. It advocated competition between 12½-inch or smaller direct-view receivers which could receive CBS color, as against 16-inch or larger direct-view receivers limited to black-and-white pictures. (R. 418.) In this context it is therefore clear that for the majority of American set owners—those possessing direct-view receivers of 16 inches* or larger and those owning TV-radio or TV-radio-phonograph combination sets with tubes smaller than 16 inches—color would be unobtainable unless they discard their receivers and purchase smaller sets.

The effect of the FCC order, then, is to force upon the majority of American TV set owners, the choice of adapting their sets to receipt of the CBS signal in black-and-white alone, or of foregoing available television information or entertainment for want of such adaptation. This would be the inevitable result of the Commission's adoption of CBS standards, although "the facilities of radio are limited * * * precious [and] cannot be left to wasteful use without detriment to the public." *National Broadcasting Co.* v. *United States*, 319 U. S. 190, 216, 63 S. Ct. 997, 1009.

The Commission heard evidence from independent manufacturers that aside from installation costs, external adapters with automatic switching from 525-line standard monochrome to 405-line CBS monochrome, could be made at a cost ranging from $37.00 to $65.00. (R. 147-8.) These figures which were among the lowest submitted in the testimony taken by the FCC, are unquestionably obsolete. Since May 26, 1950, when the FCC hearings closed, this country has experienced great rises in the cost of labor and materials.

The Commission also found that, based upon evidence

* We have no separate figures for 14 inch sets which are not convertible to color by FCC admission.

offered by independent manufacturers called as CBS witnesses, the retail price of adapting and converting an existing 7-inch tube receiver to CBS color would range from $95.00 to $130.00, the adaptation and conversion of a 10-inch set could be effectuated for from $110.00 to $150.00, and the adaptation and conversion of a 12½-inch set could be achieved for $125.00 to $170.00. (R. 148-9.) These figures apparently do not cover installation costs, and certainly do not take into account the inflation which now besets the nation.

Yet with its estimates standing alone without consideration of these other factors, the Commission has outlined a burdensome undertaking for that section of the television-viewing public which still owns smaller tube receivers.

At the time of the proceedings in the District Court, 7-inch receivers, no longer in production, were worth about $25.00. (R. 783.) As this brief was being written, new 10-inch receivers were being offered for sale in Chicago for $69.50. New 12½-inch sets were being sold for $139.95. (Chicago Daily News, March 14, 1951, p. 22.) The FCC tells those members of the public who own antiquated receivers in the smaller sizes that they may secure an additional service in the form of color if they will pay out in cash, to adapt and convert such receivers, from one and one-half to five times their existing value. To the majority of set owners, those who own larger receivers or smaller tube receivers combined with radio, phonograph or both, the Commission in effect says "You may not have the benefit of a color broadcast at all. Nor may you receive color broadcasts as black-and-white pictures unless you are willing to adapt your set by spending from $37.00 to $65.00, plus installation charges. This expenditure will give you access only to all services which were available to you in black-and-white before our order became effective. And you may receive CBS signals dur-

ing color broadcast periods, only as degraded, inferior black-and-white pictures."

There are more obvious flaws in the FCC approach to adaptation and conversion of existing sets. In all public demonstrations of the CBS system (see, for example, Time Magazine, October 23, 1950, p. 66) there was exhibited a CBS converter mounted on the corner of a television receiver. It was not demonstrated at the hearings that it would be possible to accomplish mass production of such converters. Common sense affirms the contrary. If the converter is to be mounted on the television receiver, consideration must be given to the wide variety of receiver designs. The unrefuted affidavit of J. O. Reinecke, industrial designer, submitted in the District Court, clearly sets forth the problem. Mr. Reinecke asserted:

> "I can state categorically that a standardization of adaptation and conversion systems on existing television receivers is impossible, not only because of the frequent changes in the physical cabinet design which have been made from time to time by the various manufacturers, but also because of the wide variety of shapes, dimensions, tube positions, knob positions, accessory positions, and utility space positions of the various television receivers.
>
> "The most difficult task of the designer attempting to create a mass-produced adaptation and color conversion system, is the placement of the color wheel in relationship to the receiving tube. Since this wheel must, according to all projections, be not less than twice the size of the tube, the designer is faced with the problem of relating the wheel or disc diameter to all of the external features of the receiver. Thus, on some receivers there are tuning knobs which would either be in the path of the color converter disc or which would be concealed by the disc or its housing. Many receivers have doors which could not be opened or closed across the space which must be allocated to the wheel. Other receivers have space for phonograph

or radio mechanism or album storage, which necessarily would conflict with wheel coverage.

"There has been no standardization of tube location in existing television receivers. Some are at the top of the cabinet. Some are centered on the cabinet. Some are recessed into the cabinet. Others project from the cabinet.

"Some cabinets have square corners. Others have rounded corners. In combination sets, the TV viewing tube may be on the left side of the cabinet, or it may be on the right side of the cabinet. The tube may be placed relatively high or relatively low with reference to the top of the cabinet." (R. 774.)

Are these practical observations to be rejected because they are "outside the record made before the Commission"? They certainly demonstrate that the findings of the FCC regarding the levels of costs for adapting and converting existing design receivers to receipt of the CBS signal are based entirely upon fantasy, not facts. Mr. Reinecke's statement also offers some common sense remarks on the problems of designing color converters, both for existing receivers and in new model receivers so that they will blend into the lines and shapes of normal household furniture. These comments further document the FCC disregard of the facts of life.

The lucid plea against the FCC order of a typical retailer of television receivers is contained in the affidavit of Richard L. Hirsch filed in the Court below. (R. 777-89.) This furnishes a full recital of the burdensome problems thrust upon the retailers of the nation who would have the responsibility of foisting upon the buying public the adapters, converters and new model receivers for the handling of CBS color broadcasts.

But the greatest reality of all is "outside the record made before the Commission". After the hearings were concluded in May, 1950, war broke out in Korea. The

nation was alerted. On September 1st Congress passed the Defense Production Act of 1950, Public Law 774, 81st Congress, Ch. 932, 2nd Sess., H. R. 9176; Approved Sept. 8, 1950. Administrative agencies were set up to mobilize material and manpower for the national defense. Allocations of vital materials to all non-essential manufacturing industries, including TV manufacture, were drastically restricted. Materials conservation became imperative. Yet in the face of all this the FCC still persists in struggling to sanctify its improper order. It is ironic that while emergency action is demanded by every other branch of the Federal government to conscript and conserve material and manpower in aid of the defense effort, the Commission still fights to uphold an order which will inevitably create a degree of public pressure for additional metals, for additional wiring, and for additional labor, merely to enable television receiver owners to maintain the access to all of the black-and-white broadcast service they are now receiving; and perhaps, in fewer instances, to receive the benefit of the CBS color broadcasts.

The interests of the nation at large in radio and television communications will be best served by the early thwarting of this ill-conceived FCC-CBS experiment, the return of the color television problem to the arena of laboratory improvement and trial broadcasting, and the effectuation of a truly compatible color system which will not disturb the full and efficient use of present receivers.

II.

The Commission's Reports and Orders Were at Substantial Variance With Its Notice of Proposed Rule-Making.

In the proceedings below, the defendants urged the Court to ignore any evidence, observation or evaluation made or offered by this appellant, because such matters were not submitted to the Commission during the course of its hearings, and hence were outside the administrative record. As we pointed out above, the statute permitting intervention by "communities, associations, corporations, firms and individuals interested in the controversy or question before the Commission * * * at any time after the commencement [of an action in the District Court] to enforce, suspend, enjoin, annul, or set aside, in whole or in part, any order of the [Federal Communications] Commission * * *" Title 28, U. S. C. 2321, 2323; Title 47, U. S. C. 402(a), must be construed to permit such interveners to submit pertinent evidence and advance reasonable contentions *dehors* the administrative record. We repeat that we do not advocate that the Court should conduct a trial *de novo* upon such evaluations or evidence. But we submit that the Court is empowered to suspend the Commission's order and compel it to hear and weigh pertinent evidence and sensible contentions which first appear at the instance of an intervener in the review proceeding.

The Commission's suggestion that this appellant was derelict in not appearing at its Rule-Making hearings points up the invalidity of the order complained of. Such order was promulgated in violation of the notice requirements of the Administrative Procedure Act, Title 5 U. S. C., § 1001, *et seq.*

Section 4 (a) of the Administrative Procedure Act provides (Title 5, U. S. C., § 1004a):

"General notice of proposed rule-making shall be

published in the Federal Register * * * and shall include * * * (3) either the terms or substance of the proposed rule or a description of the subjects and issues involved."

Section 4(e) of the Act (Title 5, U. S. C., § 1004e) requires the Court to "(B) hold unlawful and set aside agency action, findings and conclusions found to be * * * (4) without observance of procedure required by law."

The most careful reading of the Notice of Proposed Rule-Making issued by the Commission on July 11, 1949, would lull into a false sense of security a party in the position of this appellant, or any television manufacturer who owned no basic patents or any distributor or retailer of television receivers. Paragraph 13 (a) of the Notice advised "persons with relevant information [to] file proposals in accordance with Appendix A * * * and * * * be prepared to submit information * * * with respect to modification of transmitters and receivers to provide the degree of compatibility contemplated by Appendix A, Paragraph II-C-2." (R. 21.) Paragraph II-C of Appendix A read as follows:

> "It is proposed to consider changes in Transmission Standard for Channels 2 through 55 *only upon a showing in these proceedings that:*
>
> * * * * *
>
> "2. Existing television receivers designed to receive television programs transmitted in accordance with present transmission standards will be able to receive television programs transmitted in accordance with the proposed new standards *simply by making relatively minor modifications in such existing receivers.*" (Italics supplied.) (R. .....)

In the context of such proposed rule-making, this appellant had nothing to fear and possessed no relevant information to offer the Commission. Indeed, in this Notice,

the Commission announced the prospects for an orderly transition to color television broadcasting which would enhance the future of TV broadcasting and manufacturing and offer more fruitful employment opportunities to the members of the Union.

Yet the Commission concluded its Rule-Making proceedings by adopting color television broadcasting standards which (1) will produce no signal at all on existing receivers without substantial modifications therein; (2), on most receivers extant, will produce only a degraded black-and-white picture after major modifications, and (3) will make possible color pictures on certain existing, but antiquated, small receivers (12½ inches or less) by the addition of equipment at a cost of from one and a half to five times (at the Commission's own estimates) the value of such existing smaller receivers.

Nothing in the Commission's Notice suggested the possibility that broadcast standards would be fixed whereby the manufacturing industry would be forced to manufacture sets in the smaller sizes which the public had already found unsatisfactory. Certainly nothing in the Notice indicated that the Commission would establish a new additional standard for black-and-white broadcasting—405 lines, 48 black-and-white fields per second, with about 40% of the picture elements contained in the previously established black-and-white broadcasting standard of 525 lines and 60 fields per second.

In promulgating a second standard of black-and-white broadcasting, the Commission completely ignored the inescapable fact, that should CBS broadcasting standards be adopted, for the vast majority of the nation's set owners,—the owners of sets with tubes larger than 12½ inches or of sets with tubes 12½ inches or smaller combined with radio, phonograph or both,—a color conversion will be im-

possible. The greater market likelihood is that they will not discard their receivers for smaller sets built or adapted for CBS color. The adaptation of their sets for receipt of the CBS signal in degraded black-and-white would be the only way in which they would be able to enjoy CBS-style broadcasts. The principal reality which flows from the Commission's order for the majority of receiver owners is not color broadcasting but a double standard of black and white broadcasting.

Accordingly, for these reasons alone, we respectfully submit that the Commission's procedures violated the Administrative Procedure Act, in that they did not, by proper notice, afford to persons interested an opportunity to offer information concerning broadcasting standards encompassing (1) actual incompatibility in the new broadcasting system, (2) major modifications in existing receivers to receive only a black-and-white signal, (3) establishment of two standards of black-and-white broadcasting, and (4) the imposition of smaller receivers upon a public which has rejected such sizes in the open market. Yet such are the components of the Commission's order here under attack.

CONCLUSION.

It is respectfully submitted that for the reasons stated the judgment of the Court below should be reversed.

ALFRED KAMIN,
Counsel for Appellant, Local 1031, International Brotherhood of Electrical Workers, AFL.

APPENDIX A.

Text of Statutes Involved.

Communications Act of 1934, as amended (47 U. S. C. § 151 *et seq.*).

§ 402. (a) The provisions of Title 28, relating to the enforcing or setting aside of the orders of the Interstate Commerce Commission, are made applicable to suits to enforce, enjoin, set aside, annul, or suspend any order of the Commission under this chapter (except any order of the Commission granting or refusing an application for a construction permit for a radio station, or for a radio station license, or for renewal of an existing radio station license, or for modification of an existing radio station license, or suspending a radio operator's license), and such suits are authorized to be brought as provided in such Title 28. (48 Stat. 1093, as amended, 50 Stat. 197, 63 Stat. 108).

Judiciary and Judicial Procedure (Title 28 U. S. C.).

Sec. 2321. *Procedure generally; process.*

The procedure in the district courts in actions to enforce, suspend, enjoin, annul or set aside in whole or in part any order of the Interstate Commerce Commission other than for the payment of money or the collection of fines, penalties and forfeitures, shall be as provided in this chapter.

The orders, writs, and process of the district courts may, in the cases specified in this section and in the cases and proceedings under sections 20, 23, and 43 of Title 49, run, be served, and be returnable anywhere in the United States. (June 25, 1948, ch. 646, Sec. 1, 62 Stat. 969, amended May 24, 1949, ch. 139, Sec. 115, 63 Stat. 105.)

SEC. 2322. *United States as party.*

All actions specified in section 2321 of this title shall be brought by or against the United States. (June 25, 1948, ch. 646, Sec. 1, 62 Stat. 969, eff. Sept. 1, 1948.)

SEC. 2323. *Duties of Attorney General; intervenors.*

The Attorney General shall represent the Government in the actions specified in section 2321 of this title and in actions under sections 20, 23, and 43 of Title 49, in the district courts, and in the Supreme Court of the United States upon appeal from the district courts.

The Interstate Commerce Commission and any party or parties in interest to the proceeding before the Commission, in which an order or requirement is made, may appear as parties of their own motion and as of right, and be represented by their counsel, in any action involving the validity of such order or requirement or any part thereof, and the interest of such party.

Communities, associations, corporations, firms, and individuals interested in the controversy or question before the Commission, or in any action commenced under the aforesaid sections may intervene in said action at any time after commencement thereof.

The Attorney General shall not dispose of or discontinue said action or proceeding over the objection of such party or intervenor, who may prosecute, defend, or continue said action or proceeding unaffected by the action or nonaction of the Attorney General therein. (June 25, 1948, ch. 646, Sec. 1, 62 Stat. 970; amended May 24, 1949, ch. 139, Sec. 116, 63 Stat. 105.)

SEC. 2324. *Stay of Commission's order.*

The pendency of an action to enjoin, set aside, annul, or suspend any order of the Interstate Commerce Commission shall not of itself stay or suspend the operation of the order, but the court may restrain or suspend, in whole or

in part, the operation of the order pending the final hearing and determination of the action. (June 25, 1948, ch. 646, Sec. 1, 62 Stat. 970, eff. Sept. 1, 1948.)

SEC. 2325. *Injunction; three-judge court required.*

An interlocutory or permanent injunction restraining the enforcement, operation or execution, in whole or in part, of any order of the Interstate Commerce Commission shall not be granted unless the application therefor is heard and determined by a district court of three judges under section 2284 of this title. (June 25, 1948, ch. 646, Sec. 1, 62 Stat. 970, eff. Sept. 1, 1948.)

Administrative Procedure Act (5 U. S. C. § 1001 *et seq.*)

§4. Except to the extent that there is involved (1) any military, naval, or foreign affairs function of the United States or (2) any matter relating to agency management or personnel or to public property, loans, grants, benefits, or contracts—.

(a) *Notice.*—General notice of proposed rule making shall be published in the Federal Register (unless all persons subject thereto are named and either personally served or otherwise have actual notice thereof in accordance with law) and shall include (1) a statement of the time, place, and nature of public rule making proceedings; (2) reference to the authority under which the rule is proposed; and (3) either the terms or substance of the proposed rule or a description of the subjects and issues involved. Except where notice or hearing is required by statute, this subsection shall not apply to interpretative rules, general statements of policy, rules of agency organization, procedure, or practice, or in any situation in which the agency for good cause finds (and incorporates the finding and a brief statement of the reasons therefor in the rules issued) that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest.

* * * * *

(e) *Scope of Review.*—So far as necessary to decision and where presented the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of any agency action. It shall (A) compel agency action unlawfully withheld or unreasonably delayed; and (B) hold unlawful and set aside agency action, findings, and conclusions found to be (1) arbitrary, capricious, and abuse of discretion, or otherwise not in accordance with law; (2) contrary to constitutional right, power, privilege, or immunity; (3) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right; (4) without observance of procedure required by law; (5) unsupported by substantial evidence in any case subject to the requirements of sections 1006 and 1007 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or (6) unwarranted by the facts to the extent that the facts are subject to trial *de novo* by the reviewing court. In making the foregoing determinations the court shall review the whole record or such portions thereof as may be cited by any party, and due account shall be taken of the rule of prejudicial error. (60 Stat. 243, 5 U. S. C. § 1009.)

APPENDIX B.

TABLE 1.

TELEVISION SETS—PRODUCTION—1950*

	Jan.	Feb.	Mar.	Apr.	May	June	July	Aug.	Sept.	Oct.	Nov.	Dec.	Year
Table Model													
Without Conventional Radio:													
Under 10"				4,590	290	500	10	40	40	20	960	170	
10" or 11"				6,880	1,290	60	10	2,490	1,070	—	2,070	130	
12", 13", 14" or 15"	214,270	210,190	323,110	160,390	126,150	76,320	56,450	69,070	50,850	34,240	100,260	33,410	2,888,960
16", 17" or 18"				93,670	98,880	125,390	67,140	151,990	211,380	203,960	164,530	250,230	
19" and over				10	30	140	3,030	7,570	2,310	10,730	3,990	18,590	
Projection				—	—	—	—	—	—	—	—	60	
With Conventional Radio (AM or FM or both):													
Under 10"				—	—	—	—	—	—	—	—	—	
10" or 11"				100	—	—	—	—	—	—	10	70	
12", 13", 14" or 15"	8,710	4,500	5,470	1,700	2,600	1,520	—	560	360	2,110	1,550	90	52,600
16", 17" or 18"				1,980	1,300	1,050	980	2,960	1,500	8,420	3,180	1,420	
19" and over				—	—	—	—	—	—	330	60	70	
Projection				—	—	—	—	—	—	—	—	—	
Console or Consolette Without Conventional Radio:													
Under 12"				30	30	40	—	30	—	—	20	80	
12", 13", 14" or 15"	177,830	212,540	286,940	75,590	51,710	71,860	33,410	41,540	35,080	4,220	54,890	8,290	
16", 17" or 18"				136,310	154,670	187,450	115,110	305,520	341,330	339,390	273,650	342,030	3,568,060
19" and over				6,680	4,460	1,870	13,480	46,550	62,150	70,100	35,240	76,070	
Projection				620	50	130	—	20	10	90	160	790	
With Conventional Radio (AM or FM or both):													
Under 12"				—	—	—	—	—	—	—	—	—	
12", 13", 14" or 15"	13,830	15,290	15,610	2,240	3,080	1,430	360	860	1,220	2,620	2,070	240	252,000
16", 17" or 18"				1,200	1,740	5,710	6,060	19,640	21,650	17,980	12,850	12,000	
19" and over				9,570	10,040	12,210	6,880	12,220	9,520	9,340	12,120	12,420	
Projection				—	—	—	—	—	—	—	—	—	
Phonograph Combinations With or without Conventional Radio:													
Under 12"				70	10	—	10	80	90	—	40	110	
12", 13", 14" or 15"	24,060	37,380	55,470	23,430	6,000	1,350	1,860	11,070	11,140	6,120	10,640	5,660	702,180
16", 17" or 18"				16,270	21,940	13,200	21,520	42,610	78,420	110,690	52,680	75,560	
19" and over				1,270	1,730	2,270	1,190	5,780	15,680	17,940	7,830	21,010	
Projection				—	—	—	—	—	—	—	—	—	
Total	438,700	479,900	686,600	542,600	486,000	502,500	327,500	720,600	843,800	838,300	738,800	858,500	7,463,800
No. of above TV Sets with FM	44,560	56,140	75,290	43,610	36,050	27,690	53,410	64,030	82,760	84,800	91,770	96,010	756,120

* Source: Radio and Television Manufacturers Association.

TABLE 2.

TELEVISION SETS—PRODUCTION—1950*

	Jan.	Feb.	Mar.	Apr.	May	June	July	Aug.	Sept.	Oct.	Nov.	Dec.	Annual Totals
All Models													
Under 10"				4,590	290	500	10	40	40	20	960	170	6,620
10" or 11"				7,080	1,330	100	20	2,600	1,160	—	2,140	390	14,820
12", 13", 14" or 15"	438,700	479,900	686,600	263,350	189,540	152,480	92,080	123,100	98,650	49,310	169,410	47,690	2,790,810
16", 17" or 18"				249,430	278,530	332,800	210,810	522,720	654,280	680,440	506,890	681,240	4,117,140
19" and over				17,530	16,260	16,490	24,580	72,120	89,660	108,440	59,240	128,160	532,480
Projection				620	50	130	—	20	10	90	160	850	1,930
Total	438,700	479,900	686,600	542,600	486,000	502,500	327,500	720,600	843,800	838,300	738,800	858,500	7,463,800

* Source: Radio and Television Manufacturers Association.

TELEVISION SETS—PRODUCTION—1951

	January		February
	No. of sets mfd.	%	No. of sets mfd.
15" and smaller	30,904	4.78	33,959*
16", 17", 18"	540,445	83.70	594,645*
19" and larger	74,367	11.52	81,844*
Total	645,716	100.00	710,448**

* Estimated.

** Actual RTMA Production estimate for February.